A

SUZIMI SHAARI

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: A-05-22-2007]

C

15 MARCH 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Appeal against conviction and sentence - Whether drugs found at accused's home was for trafficking - Whether*

D

accused's defence was an afterthought - Whether accused allowed to raise personal consumption as a defence - Whether entrapment was a substantive defence - Whether trial judge erred in his findings - Whether accused succeeded in casting doubt on prosecution's case

E

CRIMINAL PROCEDURE: *Defence - Denial - Whether accused's defence was an afterthought - Whether there was other acceptable explanation for accused's conduct*

CRIMINAL PROCEDURE: *Trial - Defences - Dangerous Drugs Act 1952 - Whether entrapment a substantive defence - Whether accused had*

F

to prove that he committed the offence due to entrapment - Whether accused was an "unwary innocent" - Whether accused readily participated in the crime

EVIDENCE: *Informer - Failure to call informer as witness - Whether*

G

informer protected under s. 40 Dangerous Drugs Act 1952 -Whether informer played the role of an agent provocateur - Whether failure to call informer caused a gap in prosecution's case

EVIDENCE: *Credibility - Discrepancies between police report and*

H

testimony - Whether there was material inconsistency as to the location of the box - Whether evidence as a whole supported prosecution's evidence

D/L Kpl. M. Ananthakrishnan ('PW2') was introduced to the accused by a drug informer, who had arranged a meeting at the accused's house. After negotiating the price, it was agreed that

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the drugs would be supplied to PW2 at the Gunung Semanggol rest area ('the scene'). The accused arrived at scene in a factory

bus, where PW2 and a raiding team were waiting for him. The accused got off the bus and approached PW2 with a box. PW2 then signalled the raiding team and proceeded to arrest the accused who dropped the box upon contact. ASP Nor Aimi bin Abdullah ('PW6') then seized the box and found five slabs of cannabis inside. The accused was taken to his home, where PW6 found plastic bags containing three packets and a slab of cannabis. The accused was charged with two offences of trafficking in dangerous drugs contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was convicted on both charges and sentenced to death. He appealed against the conviction and sentence to the Court of Appeal.

Held (dismissing the appeal against the first charge; allowing the appeal against the second charge in part)
Per Hasan Lah JCA delivering the judgment of the court:

(1) The role of the informer was merely to introduce PW2 to the accused. He did not take part in the discussion or negotiation. As such, he was afforded the protection under s. 40 of the Act. The non-calling of the informer did not cause any gap in the prosecution's case. (para 33)

(2) The accused denied that he agreed to supply the drugs to PW2. However, what occurred after the negotiation did not support the accused's defence. When he was arrested the accused was found to be carrying five slabs of cannabis. There was no other acceptable reason for the accused to be there with the proscribed drugs. The learned trial judge was right in his holding that the accused's defence was an afterthought. (paras 40 & 41)

(3) Entrapment was not a substantive defence. The accused had to prove that he would not have committed the offence but for the entrapment. The accused had failed to prove that he was an "unwary innocent". The evidence was clear that the accused readily participated in the offence. (paras 42 & 43)

(4) PW6 testified that the box was on the road. However, in his police report it was stated that he seized the box from the accused. Looking at the evidence as a whole, there was no material inconsistency in the prosecution's evidence. The evidence showed that before he was arrested the accused was

holding the box and he was the one who carried it to the scene for the purpose of delivering it to PW2. (paras 45 & 46)

(5) The accused was allowed to raise the defence of personal consumption in a trafficking case. The small amount of cannabis and the fact that it was kept in the accused's bedroom were taken into consideration. The accused was able to raise doubt in the prosecution's case that the cannabis found in his bedroom was for trafficking. (para 57)

[The second conviction was substituted with one under s. 6 read together with s. 39A(2) of the Act.]

Bahasa Malaysia *Translation Of Headnotes*

D/L Kpl. M. Ananthakrishnan ('PW2') diperkenalkan kepada tertuduh oleh seorang pemberi maklumat dadah, yang telah menetapkan satu pertemuan di rumah tertuduh. Selepas perundingan harga, ianya disetujui bahawa dadah akan dibekalkan kepada PW2 di hentian rehat Gunung Semanggol ('tempat pertemuan'). Tertuduh tiba di tempat pertemuan dengan bas kilang, di mana PW2 dan pasukan serang hendap menunggunya. Tertuduh turun dari bas dan mendekati PW2, dengan memegang sebuah kotak. PW2 kemudian memberi isyarat kepada pasukan serang hendap dan terus menangkap tertuduh. Kotak yang dipegang oleh tertuduh terjatuh dari tangannya apabila PW2 menangkapnya. ASP Nor Aimi bin Abdullah ('PW6') kemudian mengambil kotak itu dan menjumpai lima keping kanabis di dalamnya. Tertuduh kemudian dibawa ke rumahnya, di mana PW6 menemui beg plastik yang mengandungi tiga bungkusan dan sekeping kanabis. Tertuduh dituduh dengan dua kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('DDA') dan didapati bersalah untuk kedua-dua tuduhan dan dijatuhkan hukuman mati. Tertuduh merayu ke atas sabitan dan hukuman.

Diputuskan (menolak rayuan terhadap pertuduhan pertama; membenarkan sebahagian rayuan terhadap pertuduhan kedua)

Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Tugas pemberi maklumat disini hanya untuk memperkenalkan PW2 kepada tertuduh. Beliau tidak mengambil bahagian dalam perbincangan atau perundingan yang diadakan di rumah

tertuduh. Oleh itu, beliau diberikan perlindungan di bawah s. 40 DDA. Kegagalan pihak pendakwaan memanggil pemberi maklumat sebagai saksi tidak mewujudkan jurang dalam kes pihak pendakwaan.

(2) Tertuduh menafikan bahawa beliau bersetuju untuk membekalkan dadah kepada PW2. Namun, apa yang berlaku selepas rundingan itu tidak menyokong pembelaan tertuduh. Ketika beliau ditangkap tertuduh dijumpai dengan lima keping kanabis. Tertuduh tidak mempunyai alasan yang munasabah untuk berada di tempat kejadian dengan dadah tersebut. Hakim pembicaraan, oleh itu, memutuskan dengan betul bahawa pembelaan tertuduh hanya rekaan semata-mata.

(3) Pemerangkapan bukan satu pembelaan substantif. Tertuduh perlu membuktikan bahawa beliau tidak akan melakukan kesalahan jika tidak kerana pemerangkapan berkenaan. Tertuduh telah gagal membuktikan bahawa beliau adalah seorang "unwary innocent". Keterangan jelas menunjukkan bahawa tertuduh telah melakukan kesalahan itu dengan sukarela.

(4) PW6 memberi keterangan bahawa kotak itu ditemui di atas jalan, namun, laporan polisnya menyatakan bahawa kotak itu dirampas dari tertuduh. Meneliti keterangan secara keseluruhan, tiada percanggahan material dalam keterangan pihak pendakwaan. Keterangan jelas menunjukkan bahawa sebelum beliau ditangkap tertuduh memegang kotak itu dan beliau yang membawanya ke tempat kejadian untuk tujuan penghantaran kepada PW2.

(5) Tertuduh dibenarkan untuk mengemukakan pembelaan penggunaan peribadi dalam kes pengedaran dadah. Jumlah kanabis yang kecil dan hakikat bahawa ianya disimpan di dalam bilik tidur tertuduh diberi pertimbangan. Tertuduh telah menimbulkan keraguan dalam kes pendakwaan bahawa kanabis yang ditemui di dalam bilik tidurnya adalah untuk pengedaran.

[Pertuduhan kedua digantikan dengan sabitan di bawah s. 6 dibaca dengan s. 39A (2) DDA.]

Case(s) referred to:

Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 SC ***(refd)***

Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***

PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***

Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Wan Mohd Azman Hassan v. PP [2010] 4 CLJ 529 FC ***(refd)***

Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 6, 289

Dangerous Drugs Act 1952, ss. 2, 37(da), 39A(2), 39B(1)(a), (2), 40, 40A

Evidence Act 1950, s. 15

For the appellant - Bernard Francis; M/s Bernard Francis

For the respondent - Fatnin Yusof DPP

[Appeal from High Court, Taiping; Criminal Trial Nos: 45-13-2005 & 45-14-2005]

Reported by Melinda Robert

JUDGMENT

Hasan Lah JCA:

[1] The accused was charged with two offences of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). First, he was charged with trafficking in 4877 grams of cannabis on 2 August 2001 at the Gunung Semanggol rest area, KM 195.5, North-South Highway, in the District of Kerian, Perak. Secondly, he was charged with trafficking in 263.2 grams of cannabis on the same date at No. 127, Jalan Gula, Simpang Empat, Semanggol in the District of Kerian, Perak.

[2] The accused was convicted by the learned trial judge on both the charges and sentenced to death. He appealed against the decision. We heard his appeal and dismissed his appeal in respect of the first charge. In respect of the second charge, we allowed his appeal and set aside the order of the learned trial judge and convicted him under s. 6 of the Act read together with

s. 39A(2) of the Act. He was then sentenced to ten years imprisonment with effect from the date of his arrest for possession of 263.2 grams of cannabis.

[3] We now give the grounds of our decision.

[4] The evidence as unfolded revealed the following facts. Pursuant to an arrangement made by an informer PW2 (D/L Kpl. M. Ananthakrishnan), who acted as an agent provocateur and posed as a drug purchaser, met with the accused at the accused's house on 31 July 2001 at about 10pm. At the meeting PW2 was accompanied by the informer.

[5] At the accused's house, the informer introduced PW2 to the accused. After about 5 minutes, PW2 asked the informer to buy cigarettes and leave both of them alone.

[6] After the informer left, PW2 told the accused that he was a drug trafficker from Kuala Lumpur and wanted to buy the drug from the accused. The accused agreed to supply 5 kilograms of cannabis at a price of RM1,400 for a kilogram. After negotiation the accused agreed with the price of RM5,700 for 5 kilograms of cannabis.

[7] It was agreed that the delivery of the cannabis would be made at the Gunung Semanggol rest area, on the left side of the North-South Highway heading towards Kuala Lumpur, on 2 August 2001 at 10pm. The accused told PW2 that he would go there with a factory bus. PW2 then gave his mobile phone no. 012-5176666 to the accused and the accused also gave his mobile phone no. 012-4568590 to him.

[8] In the morning of 2 August 2001 PW2 called the accused and asked him about the arrangement that night ("malam ni macam mana") and the accused answered 'line clear'. At about 8pm PW6 (ASP Nor Aimi bin Abdullah) briefed his men of their duties in the ambush and PW6 asked PW2 to proceed with his dealing with the accused. PW6 also instructed PW7 (D/L Kpl. Rosli bin Budin and D. Kpl. Zamri to keep their eyes on the accused and to tail the accused from his house to the place where the drug was supposed to be delivered to PW2.

[9] At about 8.25pm PW2 called the accused and informed him that he was on his way to the place where the drug was supposed to be delivered to him by the accused. The accused told PW2 to call him when he arrived at the Gunung Semanggol rest area.

[10] At about 9.15pm PW2 called the accused again and informed him that he had arrived at the agreed place. The accused asked him whether he had enough money and PW2 told the accused that he had the money. PW2 then asked the accused whether he had the drug with him and the accused told PW2 that he had the drug ('Barang sudah ada, awak jangan bimbang. Barang kali ini memang yang paling power'). The accused also informed PW2 the place of the delivery of the drug had been changed to the other side of Gunung Semanggol rest area, as one heads towards the north.

[11] PW2 and the raiding party then went to the new place. At about 10pm PW2 called the accused and informed him that he had arrived at the new place of delivery. At about 10.10pm PW2 saw a blue factory bus no. PBH 9399 arrived and stopped about 30 meters from PW2. The accused got off from the bus and went to meet PW2. The accused asked PW2 about the money and PW2 told him the money was in the car. PW2 then asked the accused about the drug and the accused told him he had the drug. PW2 then asked the accused to bring the drug to his car and he would then pay the accused for the drug.

[12] The accused then drove the bus and stopped it near PW2. He got down from the bus through the passengers' door carrying a box. When the accused was near PW2, PW2 gave the signal to the ambush team to arrest the accused and he identified himself to the accused as a policeman and he put his arms around the accused's body. The accused let go of the box.

[13] PW6 then arrived at the place and seized the box. Inside the box PW6 found five compressed slabs of dried leaves which he suspected to be cannabis.

[14] From there PW6 took the accused to the accused's house. Inside the bedroom of the accused's house, PW6 found a bag. Inside the bag there was a pink plastic bag which contained a slab of cannabis. Beside the bag there was a small batik bag. Inside the batik bag PW6 found another pink plastic bag which contained three packets of cannabis.

[15] All the exhibits recovered were handed over to the Investigating Officer (PW8) on 3 August 2001 at about 12.20am at the Narcotics Department, Kerian, Perak. On 6 August 2001 PW8 sent the drug exhibits to the Government Chemist (PW5) at the Chemistry Department, Perak and on 31 October 2001 he received them back from PW5.

[16] PW5 testified that after he analysed the drugs he found them to be cannabis as defined in s. 2 of the Act. The nett weight of the cannabis recovered at the Gunung Semanggol rest area was 4,877 grams and the nett weight of the cannabis recovered from the accused's house was 263.2 grams.

[17] In his defence the accused said he had known a person by the name of Khalid three or four years prior to the incident. On 30 July 2001 Khalid came to his house and told him his friend wanted to see him to buy drug from him. On the following day, 31 July 2001, at about 7.30pm Khalid came with an Indian man to his house. Khalid introduced the Indian man to him as 'Mike'.

[18] According to the accused Mike wanted to buy cannabis from him. The accused told Mike that he would try to get the drug from his friends. The accused claimed that in the discussion Khalid asked him to get the drug as he did not want to disappoint Mike. The accused also claimed that Khalid was with them when he and Mike were discussing the supply of the cannabis. There was also another person by the name of Wan at that time. Wan was the accused's friend and Wan also took part in the discussion.

[19] The accused denied that he promised to supply the cannabis to Mike. He also denied he told Mike that the price of the cannabis was RM1,400 per kilogram and he agreed to supply 5 kilograms of cannabis to Mike. He further denied that he told Mike the price for 5 kilograms of cannabis was RM5,700. He also denied he promised to deliver the drug at Gunung Semanggol rest area of the North-South Highway.

[20] On 1 August 2001 Khalid called the accused twice to inquire about the drug and he told Khalid the drug was not yet available. On 2 August 2001 at about 11.30am Mike called him and asked him whether he had the drug and he told Mike he still did not have the drug. Mike then told the accused that he wanted to meet the accused at Gunung Semanggol rest area, on the side as one heads towards the north, at about 10pm that night.

[21] At about 5.30pm Mike called him again and asked him whether he would be coming. He told Mike that he would be coming to the place and would drive a factory bus.

[22] At about 9.30pm that night he went to Gunung Semanggol rest area to meet Mike. He claimed that he went there not for the purpose of delivering the drug to Mike. When he arrived there he stopped his bus near Mike who was waving his hands at him. After parking the bus he walked towards Mike and when he was close to Mike, Mike held him, and shouted 'tangkap' 2 or 3 times. At the same time a number of police officers rushed towards them and handcuffed him.

[23] The accused claimed a few police officers boarded the bus at the same time. A few minutes later the police officers got down from the bus carrying a box. They asked him to admit that the box belonged to him.

[24] The accused denied that when he got down from the bus to meet Mike he was carrying a box. He denied that he put the box in the bus. He denied he was a drug trafficker. He denied that the box which contained the cannabis belonged to him.

[25] With regard to the second charge, the accused admitted that the cannabis found in the house belonged to him. His defence was that the cannabis was for his own consumption. He was a drug addict for ten years. He smoked cannabis 4 to 5 times a day. The cannabis found in his house was not for sale.

[26] At the close of the prosecution's case the learned trial judge held that the prosecution had proved a *prima facie* case against the accused on both the charges. With regard to the first charge the learned trial judge held that there was evidence of actual trafficking against the accused. The prosecution had adduced evidence of the agent provocateur (PW2), which was admissible under s. 40A of the Act, of the meetings with the accused, the negotiations for the sale and purchase of the proscribed drug, and finally when the accused was arrested he was delivering the proscribed drug to PW2. In other words, the learned trial judge found the accused was trafficking in the proscribed drug as defined under s. 2 of the Act. The learned trial judge therefore ruled that a *prima facie* case had been proved against the accused on the first charge.

[27] With regard to the second charge, the learned trial judge ruled that the evidence against the accused in the first charge was relevant and admissible under s. 15 of the Evidence Act to show knowledge or intention of the accused and that the possession was not accidental. The learned trial judge therefore held that a *prima facie* case had been proved against the accused on the second charge as the accused was keeping the cannabis found in the bedroom of his house.

[28] With regard to the accused's defence on the first charge the learned trial judge held that the accused's defence was an afterthought. The learned trial judge further held that the person 'Khalid' mentioned by the accused in his evidence was the informer mentioned by PW2. On the evidence adduced, the learned trial judge found that the informer did not take part in the negotiation between PW2 and the accused, and the informer's role was only to introduce PW2 to the accused.

[29] With regard to the accused's defence on the second charge, the learned trial judge rejected the accused's defence that the cannabis found in the bedroom of his house was for his own consumption. The learned trial judge rejected the evidence of DW2, the accused's wife, on the ground that DW2 was an interested witness and DW2 did not know that the cannabis was kept in the bedroom. Further, the accused was addicted to heroin/ morphine based on exh. P29. The cannabis was kept in a compressed form and packed which showed that it was meant for sale.

[30] The learned trial judge therefore ruled, at the conclusion of the trial, that the accused failed to raise any reasonable doubt in the prosecution's case on both the charges.

[31] With regard to the first charge learned counsel for the accused submitted that the informer played an active role in this case and in fact was an agent provocateur. As such he was not protected under s. 40 of the Act. He ought to be called by the prosecution or be offered to the defence. In support of that learned counsel cited the decision of the Federal Court in *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1.

[32] The issue relating to informer and agent provocateur had been discussed by the apex court in a number of cases. The law that deals with the issue of agent provocateur and informer is provided under ss. 40 and 40A of the Act. Whether a person is

A an informer or has become an agent provocateur would depend on the facts of each particular case (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; B *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17).

[33] The issue in the present case is whether PW2 is to be treated as an agent provocateur or as an informer. We had carefully considered the evidence available and the finding of the C learned trial judge on this issue and we were in agreement with the learned trial judge that the informer (Khalid) did not take part in the discussion or negotiation. His role was merely to introduce PW2 to the accused. As such the informer (Khalid) was afforded the protection under s. 40 of the Act. The non-calling or the non-D offering of the informer had not caused any gap to the prosecution's case. In this connection we would like to refer to the observation made by Zulkefli Makinudin FCJ in *Wan Yurillhami Wan Yaacob* at pp. 31 and 32:

> E [21] Still on the issue of whether the failure to call Seman, the informer is fatal to the prosecution's case, I would like to refer to the recent decision of the Federal Court in the case of *Ghazalee Kassim & Ors v. PP* [2009] 4 CLJ 737 wherein on this same issue Zaki Tun Azmi, CJ in delivering the judgment of the court had this to say:
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> > Who was Ah Meng? Was Ah Meng an informer or was he an agent provocateur? Does it make any difference whether Ah Meng is an informer or agent provocateur? Has the failure of the prosecution to call Ah Meng or offer him as a witness to the defence prejudiced the appellants? On the G facts of this case, has it raised any reasonable doubt as to the guilt of the appellants?
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> [22] The Federal Court, further at p. 745 of the judgment stated as follows:
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> > Section 40A of the Dangerous Drugs Act, places an agent provocateur's evidence no less credible than any witness merely by virtue of him being such. The reason according to the 3rd appellant why he wanted Ah Meng was to support his defence that he was, at the Lion City Hotel, to I meet Ah Meng to collect a gambling debt. According to the 3rd appellant, Ah Meng had a gambling debt amounting to RM25,000 owing to him. Assuming that this is so, why did he count the money brought by the prosecution witness

PW10 amounting to RM70,000 instead of just asking for the RM25,000 allegedly owed to him? There was no indication that he questioned why there was RM70.000 instead of RM25,000.

[23] The Federal Court in the above case ruled that based on the facts, the court would not invoke s. 114(g) of the Evidence Act. Similarly, it is my judgment in the present case that the non-calling or the non-offering of the informer by the prosecution had not caused any gap to the prosecution's case as it does not tend to explain the presence of the first appellant other than for the purpose of supplying the drugs to SP7. Therefore, Seman the informer in the present case is afforded the protection under s. 40 of the Act.

[34] Further, the finding of the learned trial judge that the informer did not take part in the negotiation was a finding of fact. The learned trial judge who had the advantage of audio-visual of all the witnesses during their testimonies did not believe the version of the accused. As such we should be slow in interfering with such finding of fact (see *Herchun Singh & Ors v. Public Prosecutor* [1969] 1 LNS 52).

[35] The next issue raised by learned counsel for the accused was that there was doubt and gap in the prosecution's case because this case was based on a trap set up by the police. Learned counsel for the accused argued that even though entrapment is not a substantive defence the court must give due weight to the accused's explanation in his defence. As to what was discussed between PW2 and the accused on 31 July 2001 the court only had to consider the evidence of PW2 and the accused. Learned counsel contended that the existence of the box was only mentioned for the first time at the place the accused was arrested. PW7, who was tailing the accused from his house, did not mention anything about the box.

[36] Learned counsel also contended that there was inconsistency in the prosecution's evidence with regard to the seizure of the box containing the drug. PW2 and PW6 testified that the box was found on the road whereas in exh. P14 (the police report) it was stated that the box was seized from the accused. Learned counsel for the accused therefore submitted that on the evidence available it was not safe to convict the accused.

[37] As stated earlier the learned trial judge accepted PW2's evidence that there was negotiation between PW2 and the accused on 31 July 2001 at the accused's house whereby the accused agreed to supply 5 kilograms of cannabis at the price of RM5,700. The presence of the accused at Gunung Semanggol rest area at about 10 on 2 August 2001 gave credence to PW2's evidence about the negotiation. The accused was seen carrying a box which was later found to contain the proscribed drug.

[38] Further, PW7 (D/L Kpl. Rosli bin Budin), who was asked by PW6 to follow and observe PW2, testified that on 31 July 2001 he and D/L Kpl. Mat Zaki had tailed PW2 who was driving a car. PW2 picked up a passenger (the informer) at Pejabat Pos Simpang Empat Semanggol. From there PW2 and his passenger went to a house. Five minutes after they arrived at the house PW7 saw the passenger driving PW2's motorcar heading towards Simpang Empat town. He came back to the house about 20 minutes later and about 2 or 3 minutes after that PW2 and the passenger left the house.

[39] From PW7's evidence PW2 was at the accused's house for about 25 minutes. PW2 therefore had sufficient time to negotiate with the accused for the supply of the drug. It must be noted that the negotiation took place at the accused's house. In his defence the accused did not deny that there was negotiation at his house for him to supply drug to PW2. He however denied that he agreed to supply 5 kilograms of cannabis at a price of RM5,700 and that he would deliver the drug at Gunung Semanggol rest area.

[40] We were of the view that the decision of the learned trial judge to reject the accused's defence was correct. What took place after that did not support the accused's defence. The accused was arrested at the Gunung Semanggol rest area and he was found carrying about 5 kilograms of cannabis. If he did not agree to supply 5 kilograms of cannabis to PW2 why did he have in his possession 4,877 grams of cannabis? And why did he go to Gunung Semanggol rest area at about 10pm to meet PW2 if not to deliver the drug? We were unable to accept the accused's explanation that he went there just because PW2 wanted to meet him there. It must be noted that the accused only knew PW2 on 31 July 2001. There was no reason for them to be so friendly.

[41] In his judgment the learned trial judge said: A

> Tertuduh gagal menjelaskan di sini sekiranya bukan beliau yang hendak membekalkan ganja yang dipesan oleh SP2 dan bekalan ganja juga tidak ada,
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> (i) apa perlu SP2 hendak berjumpanya, B
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> (ii) apa perlu Tertuduh bersusah payah pergi berjumpa dengan Mike di Hentian Rehat Gunung Semanggol; dan
>
> (iii) apakah tujuan mereka berjumpa.
>
> Ini gagal dijelaskan oleh Tertuduh. C
>
> Ini semua menunjukkan pembelaan Tertuduh hanya suatu dakwaan atau rekaan Tertuduh semata-mata untuk melepaskan dirinya.

[42] As regards the contention that this was a case of D entrapment, we need only refer to the decision of the Federal Court in *Wan Mohd Azman Hassan v. PP* [2010] 4 CLJ 529 that the common law position that entrapment is not a substantive defence remains the law. It is for the accused to prove that he committed the offence as a result of an entrapment. E

[43] In our view the accused failed to show that he was actually an "unwary innocent" who would not, but for the entrapment, have committed the offence. On the contrary, the evidence was clear that the accused readily participated in the offence. F

[44] We further found that there was no material inconsistency in the prosecution's evidence as to the place the box was recovered by PW6. PW2 testified that when the accused got down from the bus he was carrying the box and when the accused was in the process of handing over the box to him he G introduced himself as a police officer and tried to arrest the accused. The accused then let go of the box and the box fell on the road.

[45] According to PW6 he saw the accused carrying the box after H he got down from the bus. When PW6 saw the pre-arranged signal given by PW2 he rushed to arrest the accused. When he reached the accused he saw the box was already on the road. In his police report, P14, PW6 said "… dan rampas darinya satu kotak yang mengandungi (5) slab mampat yang disyaki dadah ganja I yang dipegang olehnya …"

[46] Looking at the evidence as a whole we did not think there was a material inconsistency in the prosecution's evidence with regard to the box. The evidence showed that before he was arrested the accused was holding the box and he was the one who carried the box to the place for the purpose of delivering it to PW2. There was therefore no merit in the defence's contention on this issue.

[47] The defence of the accused had been carefully considered by the learned trial judge in the light of the totality of the evidence adduced by the prosecution. We were in agreement with the finding of the learned trial judge that the accused's defence was an afterthought.

[48] We had considered the defence put up by the accused. The defence of the accused in respect of the first charge was difficult to be believed. More importantly, it failed to raise any reasonable doubt in the prosecution's case. We came to the conclusion that the learned trial judge was right in convicting the accused on the first charge for the offence of trafficking in the proscribed drug.

[49] For the above reasons we found the accused's appeal in respect of the first charge was devoid of any merit. It was dismissed. The conviction and sentence imposed by the learned trial judge were therefore affirmed.

[50] With regard to the second charge learned counsel for the accused submitted that the learned trial judge had erred in his finding that a *prima facie* case had been proved against the accused. He contended that the prosecution failed to prove that the drug found in the bedroom was in the exclusive possession of the accused. The accused's wife was not called to testify that the drug did not belong to her.

[51] In the alternative, learned counsel for the accused submitted at most the accused ought to be convicted for possession of the cannabis as he was a drug addict and the amount of the drug involved was only 263.2 grams.

[52] We were of the view that the learned trial judge was right to rule that a *prima facie* had been proved against the accused on the second charge. We could not find any flaw in the learned trial judge's decision when he ruled:

Berdasarkan keterangan SP6 dan pemakaian s. 15 Akta Keterangan serta kes *Wong Yew Ming*, pihak pendakwaan telah membuktikan kes *prima facie* bahawa Tertuduh menyimpan (keeping) ganja yang dirampas dari dalam P18A dan P19A dari dalam bilik tidur Tertuduh.

[53] It is to be observed that during cross-examination of PW6, the defence never suggested to PW6 that the drug found in the accused's bedroom did not belong to the accused. The accused's wife (DW2) was offered by the prosecution to the defence at the close of the prosecution's case. According to PW6 he found a diary belonging to the accused in the bag that contained the cannabis.

[54] On the evidence available we found no merit in the defence's contention on this issue.

[55] We had carefully considered the accused's defence that he was a drug addict and the cannabis found in his bedroom was for his own consumption. The urine test report, exh. P29, showed that he was addicted to morphine. The accused testified that he was addicted to cannabis since ten years ago. He smoked cannabis 4 or 5 times a day. His wife (DW2) corroborated his testimony. She said she knew the accused was a drug addict. She saw the accused smoking cannabis.

[56] The accused was entitled to raise the defence of own personal consumption in a trafficking case. This has been clearly stated by the Supreme Court in *Cohen Lorraine Philis & Anor v. Public Prosecutor* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18. At p. 21 Abdul Hamid LP said:

Despite the wide definition of the word 'trafficking' in the Act and as stated by this court in *Teh Geok Hock v. Public Prosecutor*[1] that the definition sounds artificial and is not in accordance with the ordinary meaning of the word 'trafficking', it does not mean that the defence of own personal consumption can never be raised at all by evidence.

It is implicit in the judgment in *Teh Geok Hock*[1] that the defence of own personal consumption is available but whether it will succeed would depend on the facts of each case. In our view to say that the defence of personal consumption is never available is to render meaningless the law on statutory presumption as stated in *PP v. Yuvaraj*[2] which has been accepted by our courts and

become part of our law. Thus we cannot accept the point raised by the deputy public prosecutor in this regard in the light of the rebuttable presumption specifically provided for in s. 37(da) of the Dangerous Drugs Ordinance.

[57] We had carefully considered the accused defence in respect of the second charge and we were of the considered view that his defence that the cannabis found in his bedroom was for his own consumption, when considered with the fact that the amount of the cannabis involved was small and it was kept in his bedroom, was not inherently improbable and unbelievable. In our view, the learned trial judge had erred in rejecting the accused's defence. The accused, in our view, had raised doubt in the prosecution's case that the cannabis found in his bedroom was for trafficking. We accordingly allowed his appeal and set aside the conviction under s. 39B(1)(a) and punishable under s. 39B(2) of the Act. In substitution thereof we found him guilty of possession of the proscribed drug and convicted him under s. 6 read with s. 39A(2) of the Act. He was sentenced to ten years imprisonment. We did not make any order of whipping.

[58] The Public Prosecutor's appeal in respect of our decision on the second charge only related to the punishment meted out by us. We were of the view that a sentence of ten years imprisonment was adequate after taking into consideration the facts and circumstances of the case. The drug involved was cannabis with a nett weight of 263.2 grams only, which was in excess of 63.2 grams of the presumed trafficking weight under s. 37(da) of the Act. He had no previous conviction. With regard to whipping, we were not unmindful of the fact that under s. 39A(2) of the Act a minimum whipping of ten strokes is mandatory. However, that provision must be read subject to s. 289 of the Criminal Procedure Code which provides, *inter alia*, that males sentenced to death shall not be punished with whipping. The accused had been sentenced to death for the first offence and as such to sentence him to whipping would, in our view, be in breach of s. 289 of the Criminal Procedure Code.